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Sabah Electricity Sdn Bhd v KKIP Power Sdn Bhd

B COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO S-02(W)-1123–06 OF 2016
TENGKU MAIMUN, VERNON ONG AND ABDUL RAHMAN SEBLI JJCA
1 MARCH 2017

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Civil Procedure — Summary application — Rules of Court 2012, O 14A — Appellant claimed against respondent for payment of arrears of electricity charges payable by respondent based on new rates — High Court dismissed appellant's claim pursuant to O 14A application by respondent — Whether High Court correct in finding that there was no decision by Energy Commission under s 30 of the Electricity Supply Act 1990

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Public Utilities — Electricity — Charges for electricity — Appellant claimed against respondent for payment of arrears of electricity charges payable by respondent based on new rates — High Court dismissed appellant's claim pursuant to O 14A application by respondent — Whether High Court correct in finding that there was no decision by Energy Commission under s 30 of the Electricity Supply Act 1990

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The appellant had taken over the property, rights and liabilities of the 'Lembaga Letrik Sabah' ('LLS') on 1 September 1998. Prior to the incorporation of the appellant, the respondent had commenced bulk purchases of electricity from LLS. Problem arose when the Ministry of Energy, Green Technology and Water announced that restructured tariff rates of electricity would apply from 15 July 2011 to the general public consumers under s 26 of the Electricity Supply Act 1990 ('the Act'). Based on the announcement, the appellant notified the respondent that the new rates would also apply to the bulk purchases of the respondent. The respondent disagreed with the revised rate. The appellant, vide a letter dated 24 August 2011 ('the appellants' letter') requested the Energy Commission to act as a facilitator or mediator to find a solution to the disagreement between the parties on the tariff rates. It was the appellant's case that after series of meetings between the parties, the Energy Commission decided on 7 January 2012 that the new bulk charges would be applicable to the respondent as from 1 December 2012. Despite the decision by the Energy Commission, the respondent did not pay the electricity charges based on the new tariff rates for the period of 15 July–30 November 2011. Consequently, the appellant filed its claim against the respondent for the sum of RM3,832,400.58 being the arrears of electricity charges payable by the

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respondent based on the new rates. Nonetheless, pursuant to O 14A application by the respondent, the appellant's claim was dismissed by the High Court. Hence, the present appeal. The central issue for determination was whether the High Court was correct in finding that there was no decision by the Energy Commission under s 30 of the Act on the dispute.

Held, dismissing the appeal with costs:

(1) The principles are trite that the finding of fact arrived at by the court of first instance ought not to be disturbed unless the court has so fundamentally misdirected itself. In the present appeal, the court found that the learned judge had made the correct conclusion based on the documents before him. The words 'to facilitate' or 'to mediate' appearing in the appellant's letter connote a different meaning altogether from the words 'refer the dispute for the decision of the Commission' under s 30 of the Act. The appellant's letter was certainly not to expressly refer the dispute under s 30 of the Act and neither was it an implied reference under the same section. The appellant's letter was seeking for the Energy Commission to act as mediator or facilitator for future meeting (see paras 23–24 & 26).

[Bahasa Malaysia summary

Perayu telah mengambil alih hartanah, hak dan liabiliti 'Lembaga Letrik Sabah' ('LLS') pada 1 September 1998. Sebelum pemerbadanan perayu, responden telah memulakan belian pukal elektrik daripada LLS. Masalah timbul apabila Kementerian Tenaga, Teknologi Hijau dan Air mengumumkan bahawa kadar tarif elektrik yang distruktur semula akan terpakai dari 15 Julai 2011 kepada pengguna awam secara amnya di bawah s 26 Akta Bekalan Elektrik 1990 ('Akta tersebut'). Berdasarkan pengumuman itu, perayu telah memberitahu responden bahawa kadar baru juga terpakai kepada belian pukal responden. Responden tidak bersetuju dengan kadar yang disemak semula. Perayu, melalui surat bertarikh 24 Ogos 2011 ('surat perayu-perayu') telah meminta Suruhanjaya Tenaga untuk bertindak sebagai fasilitator atau pengantara bagi mencari penyelesaian kepada pertikaian antara pihak-pihak tersebut berhubung kadar tarif. Ia adalah kes perayu bahawa selepas siri mesyuarat antara pihak-pihak tersebut, Suruhanjaya Tenaga telah memutuskan pada 7 Januari 2012 bahawa caj pukal baru adalah terpakai kepada responden bermula 1 Disember 2012. Walaupun terdapat keputusan oleh Suruhanjaya, responden tidak membayar caj elektrik berdasarkan kadar tarif baru bagi tempoh 15 Julai–30 November 2011. Berikutan itu, perayu memfailkan tuntutannya terhadap responden bagi jumlah RM3,832,400.58 iaitu tunggakan caj elektrik yang kena dibayar oleh responden berdasarkan kadar baru. Walau apa pun, menurut permohonan K 14A oleh responden, tuntutan perayu telah ditolak oleh Mahkamah Tinggi. Justeru, rayuan ini. Isu utama untuk ditentukan adalah sama ada Mahkamah Tinggi betul dalam penemuan

bahawa tidak terdapat keputusan oleh Suruhanjaya Tenaga di bawah s 30 Akta tersebut berhubung pertikaian itu.

Diputuskan, menolak rayuan dengan kos:

(1) Prinsip-prinsip adalah lapuk bahawa penemuan fakta yang diperoleh oleh mahkamah pada mulanya tidak patut diganggu kecuali jika mahkamah telah pada dasarnya salah arah dengan sendirinya. Dalam rayuan ini, mahkamah mendapati bahawa hakim yang bijaksana telah membuat kesimpulan yang betul berdasarkan dokumen-dokumen di hadapannya. Perkataan-perkataan 'to facilitate' atau 'to mediate' yang terdapat dalam surat perayu membawa maksud yang berbeza sama sekali daripada perkataan-perkataan 'refer the dispute for the decision of the Commission' di bawah s 30 Akta tersebut. Surat perayu pastinya tidak secara nyata merujuk pertikaian itu di bawah s 30 Akta tersebut dan tidak mempunyai rujukan tersirat di bawah seksyen yang sama. Surat perayu memohon Suruhanjaya Tenaga bertindak sebagai pengantara atau fasilitator untuk mesyuarat masa hadapan (lihat perenggan 23–24 & 26).]

Notes

For cases on charges for electricity, see 10(2) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 2396–2408.

For cases on summary application in general, see 2(5) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 9604–9607.

Cases referred to

Sivalingam a/l Periasamy v Periasamy & Anor [1995] 3 MLJ 395, CA (refd)

Legislation referred to

Electricity Supply Act 1990 ss 9, 26, 29, 30, 30(1), (2), (3)
Energy Commission Act 2001
Rules of Court 2012 O 14A

Appeal from: Civil Suit No BKI-22–106/9 of 2013 (High Court, Kota Kinabalu)

Gaanesh Nandy (Gaanesh & Co) for the appellant.
Baldev Singh (Baldev Gan & Assoc) for the respondent.

Tengku Maimun JCA (delivering judgment of the court):

[1] This was the plaintiff's/appellant's appeal against the order of the High Court at Kota Kinabalu in dismissing its claim against the defendant/respondent pursuant to an O 14A application.

[2] We heard the appeal and had unanimously dismissed it. We now give our reasons. A

BACKGROUND FACTS

[3] The appellant company had taken over the property, rights and liabilities of the Lembaga Letrik Sabah ('LLS') on 1 September 1998. The appellant is licensed to supply electricity power under s 9 of the Electricity Supply Act 1990 ('the Act') throughout Sabah and Labuan. The respondent is also a licensed electrical power supplier. It is licensed under s 9 of the Act to supply electricity to the Kota Kinabalu Industrial Park area ('KKIP area'). B C

[4] Prior to the incorporation of the plaintiff, LLS and the respondent had entered into a series of meetings to negotiate the distribution and sale of electricity in the KKIP area. The respondent had commenced bulk purchases of electricity from LLS for distribution and sale to the consumers at the KKIP area. D

[5] The dispute between the appellant and the respondent started with the announcement by the Minister for Energy, Green Technology and Water on 9 January 2011 to the effect that restructured tariff rates would apply from 15 July 2011 to the general public consumers under s 26 of the Act. Vide a letter dated 13 July 2011, the appellant wrote to the respondent notifying the respondent that the new rates will also apply to the bulk purchases of the respondent with effect from 15 July 2011. The respondent disagreed with the revised rate. E F

[6] On 24 August 2011, the appellant requested the Energy Commission to act as a facilitator or mediator to find a solution to the disagreement between the parties on the tariff rates. It was the appellant's case that the request was made pursuant to s 30(2) of the Act and that after a series of meetings between the parties the Energy Commission decided on 7 January 2012 that the new bulk charges would be applicable to the respondent as from 1 December 2012. G

[7] It was further the appellant's case that by a letter dated 7 December 2013 the Energy Commission notified the respondent that the decision made on 7 December 2012 relating to the new tariff review on the respondent's bulk supply was final and conclusive. H

[8] Despite the decision of the Energy Commission, for the period between 15 July–30 November 2012 the respondent did not pay the electricity charges based on the new tariff rates but instead paid the charges based on the old rates. The respondent paid the new rates from 1 December 2012. I

[9] Vide the civil suit, the appellant claimed the sum of RM3,832,400.58 being the arrears of electricity charges payable by the respondent based on the new rates for the period between 15 July 2011–1 December 2012.

[10] The gist of the respondent's pleaded defence was that except for the Energy's Commission letter dated 17 May 2013, there was no agreement reached or any decision made by the Energy Commission within the meaning of s 30 of the Act.

PROCEEDINGS IN THE HIGH COURT

[11] In the High Court, the parties agreed to the following facts:

(a) that the tariff rates respecting the bulk purchase of electricity energy by the respondent from the appellant are with effect from 1 December 2012 to be revised to the following three component tariff rates ('the said three component tariff'):

(i) maximum demand charge RM21 per kW/month;

(ii) peak charge at 22.4 cents per kWh; and

(iii) off peak charge at 12.20 cents per kWh;

(b) the respondent has subsequent to 1 December 2012 been duly paying for its purchase of electricity from the appellant based on the said three component tariff rates;

(c) there however exist a dispute ('the said dispute') between the appellant and the respondent as to whether the electricity billings for the period between 15 July 2011 to 30 November 2012 ought to be revised and adjusted based on the said three component tariff rates; and

(d) by virtue of s 30 of the Act, the jurisdiction to hear and determine the said dispute lies with the Energy Commission which was established under the Energy Commission Act 2001 ('the Energy Commission').

[12] The respondent filed an application under O 14A of the Rules of Court 2012 for the determination of the following questions:

(1) whether the bulk purchase agreement ('the said agreement') entered into between the appellant's predecessor and the respondent was entered into under s 26 or s 29 of the Electricity Supply Act 1990 ('the said Act')?

(2) when did the dispute arise?

(3) did the appellant vide its letter dated 25 August 2011 refer the said dispute to the Energy Commission's determination?

(4) whether on 7 December 2012:

(i) did the Energy Commission determine and made a decision relating to the said dispute?

(ii) if the answer to (i) is in the affirmative, then, was it a decision made by Energy Commission pursuant to s 30(2); and

(iii) if the answer to (ii) is in the affirmative, then, is the decision binding on the parties?

(5) whether on 11 November 2014:

(i) did the Energy Commission determine and made another decision relating to the said dispute ('the said decision');

(ii) if the answer to (i) is in the affirmative, then, was the said decision made by Energy Commission pursuant to s 30(2); and

(iii) if the answer to (ii) is in the affirmative, then is the said decision binding over the parties?

(6) if a decision on the said dispute was made by Energy Commission on 7 December 2012 then, whether the same was superseded or complemented by the said decision?

[13] By consent of the parties, question No 1 was abandoned and consequently struck out.

[14] The overarching issue before the High Court was whether the Energy Commission had made a decision on the dispute between the parties in exercise of its jurisdiction under s 30 of the Act.

[15] The learned High Court judge considered s 30 of the Act which reads:

30 Determination of dispute

(1) Any party to any dispute under sections 24 to 29 regarding a supply of electricity may refer the dispute to the Commission for the decision of the Commission.

(2) The Commission shall determine the dispute and make an order accordingly:

Provided that in a case where the Commission thinks fit the dispute may be determined by an arbitrator to be appointed by the Commission.

(3) The practice and procedure to be followed in the determination of any dispute under subsection (2) shall be such as the Commission may consider appropriate.

(4) Pending the determination of any dispute arising under sections 24 to 29 between a licensee and a person requiring a supply of electricity, the licensee shall continue to give the supply of electricity until the determination of the dispute.

(5) Any order under subsection (2) may include a provision requiring either party to pay costs or expenses incurred by the Commission or the arbitrator, as the case may be, in determining the dispute.

[16] The learned High Court judge noted that sub-s (1) provides that a party may 'refer' a dispute for the 'decision' of the Energy Commission. Under sub-s (2), the Energy Commission shall 'determine' the dispute and make an 'order'. Subsection (3) provides that the Energy Commission may refer the dispute to arbitration. Subsection (3) however has no relevance to the instant case as the Energy Commission did not avail itself of the proviso of sub-s (3).

[17] Having considered the provisions of s 30 as applicable to the dispute and the amended s 30 which came into effect on 1 January 2016, the learned judge found that the appellant did not refer the respondent's refusal to pay the revised higher tariff charges for the decision of the Energy Commission under s 30 of the Act. Rather, the appellant had only sought the assistance of the Energy Commission to mediate the dispute.

[18] His Lordship nonetheless proceeded to consider whether the Energy Commission had made any 'decision' within the meaning of sub-s 30(2) of the Act. Having considered the submissions of the parties, His Lordship found merits in the argument of learned counsel for the respondent that the meeting on 7 January 22012 was merely to table the proposal discussed by the parties on 23 November 2012 and that it was not a hearing by the Energy Commission to make a decision under s 30(2) of the Act.

[19] The learned judge thus answered questions (3) and (4), which His Lordship found to be crucial questions, in the negative. The appellant's claim was consequently dismissed with costs, hence this appeal.

THE APPEAL

[20] In essence, learned counsel for the appellant submitted that the learned High Court judge erred in law and in fact:

(a) in holding that there was no dispute referred to the Energy Commission for determination under s 30 of the Act; and

(b) in failing to consider the letter dated 17 May 2013 from the Energy Commission to the respondent which bears the caption 'Keputusan Mesyuarat pada 7 Disember 2012 Mengenai Semakan Semula Bekalan Pukal KKIP Power Sdn Bhd' which reiterate that a decision was made by the Energy Commission.

OUR DECISION

[21] The dispute between the parties was in respect of the period between 15 July–30 November 2012 and it was conceded that the jurisdiction to decide on the dispute is vested in the Energy Commission pursuant to s 30 of the Act. Hence, the central issue for our determination was whether the High Court was correct in finding that there was no decision by the Energy Commission under s 30 of the Act on the dispute.

[22] The learned judge made a finding of fact that the appellant had never referred the dispute to the Energy Commission within the meaning of sub-s 30(1). In coming to his conclusion that there was no reference for determination by the Energy Commission within s 30, the learned judge had before him the affidavit evidence and in particular, His Lordship had scrutinised the letter dated 24 August 2011 from the appellant to the Energy Commission where the appellant sought the assistance of the Energy Commission to act as the facilitator or mediator in the future meeting to find the best solution for the parties.

[23] We reminded ourselves of the role of an appellate court where the principles are trite that the finding of fact arrived at by the court of first instance ought not to be disturbed unless the court has so fundamentally misdirected itself (see for example *Sivalingam a/l Periasamy v Periasamy & Anor* [1995] 3 MLJ 395).

[24] In the instant appeal, we found that the learned judge had made the correct conclusion based on the documents before him. We can do no better than to reproduce the relevant findings of His Lordship as follows (record of appeal Part A: pp 16–17):

> ... by virtue of s 30, the Energy Commission has become an adjudicator who is statutorily empowered to settle the dispute between the parties by making a binding order. However, in the first place, a dispute must be referred to the Energy Commission for its 'decision' as provided under the old sub-s (1). The letter that apparently brought the matter to the attention of Energy Commission is the letter written to it on 24th August 2011 by the plaintiff. The relevant part of the letter, shorn of formalities and the introductory paragraph reads as follows:
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> > Berdasarkan kepada beberapa siri perhubungan surat menyurat dan perbincangan di antara kedua-dua pihak iaitu SESB dan KKIP, pihak kami berpendapat bahawa isu ini boleh ditangani dengan lebih efektif dan produktif melalui mesyuarat dan dengan ini memohon agar pihak Suruhanjaya Tenaga berperanan sebagai fasilitator atau pengantara di dalam mesyuarat akan datang untuk mencari jalan penyelesaian terbaik bagi kedua-dua pihak.

> It is clear that the plaintiff did not 'refer' the refusal of the defendant to pay the revised higher tariff charges under s 30 for the 'decision' of the Energy Commission. The plaintiff had only sought the assistance of the Energy Commission to 'mediate' (*pengantara*) the dispute. The other words employed in the letter such as '*mesyuarat*' and '*cari penyelesaian yang terbaik bagi kedua-dua pihak*' indisputably suggests that the Energy Commission was not called upon to adjudicate the dispute in the exercise of the its statutory power and deliver a decision. In the premises, I find that there was no reference of a dispute within the meaning of s 30(1) to the Energy Commission. Without a valid reference under s 30, the Energy Commission could not have assumed jurisdiction to adjudicate the dispute and therefore Question 4 does not require an answer ...

[25] We agreed with the learned High Court judge that the essence of the appellant's letter dated 24 August 2011 requesting the Energy Commission to be the 'fasilitator atau pengantara di dalam mesyuarat akan datang untuk mencari jalan penyelesaian terbaik' did not amount to referring the dispute for Energy Commission's determination under s 30.

[26] The words 'to facilitate' or 'to mediate' appearing in the appellant's letter connote a different meaning altogether from the words 'refer the dispute for the decision of the Commission' under s 30. The letter in our judgment was certainly not to expressly refer the dispute under s 30 and neither was it an implied reference under s 30. The letter was what it says, namely seeking for the Energy Commission to act as mediator or facilitator for future meeting. Clearly, as found by the learned High Court judge, the appellant did not seek to refer the dispute for the determination or adjudication by the Energy Commission under s 30.

[27] The other document considered by the learned High Court judge in coming to his conclusion that there was no decision by the Energy Commission within the meaning of s 30 of the Act was the minutes of the meeting held on 7 December 2012. According to the learned judge, the purpose of the meeting as announced by the Chairman was to table the settlement reached by the parties at the Energy Commission's office.

[28] We found that the finding of the learned judge was consistent with the letter dated 28 November 2012 from the Energy Commission to the appellant and the respondent, notifying them of the meeting on 7 December 2012. The material parts of the letter read (record of appeal Part C: p 444):

> 2. Seperti Y. Bhg Datuk/Tuan sedia maklum, rundingan akhir isu tarif bekalan pukal di antara Sabah Electricity Sdn Bhd (SESB) dan K.K.I.P. Power Sdn Bhd (KKIPP) telah diadakan pada 23 November 2012 yang lepas.
>
> 3. Sehubungan dengan itu, sukacita dimaklumkan bahawa Suruhanjaya Tenaga akan mengadakan suatu mesyuarat membincangkan hasil rundingan mengenai isu tersebut ...

[29] The minutes of the meeting dated 7 December 2012 conveyed the same, namely (record of appeal Part C: pp 388–393): A

> 1.1 ... Tujuan mesyuarat ini diadakan adalah untuk memuktamadkan hasil rundingan akhir penyelesaian isu pertikaian tarif bekalan pukal di antara K.K.I.P. Power Sdn Bhd (KKIPP) dan Sabah Electricity Sdn Bhd (SESB) setelah beberapa siri perbincangan di antara kedua-dua belah pihak telah diadakan sebelum ini oleh Suruhanjaya Tenaga (Suruhanjaya). B

[30] Further, para 3.0 of the minutes sets out the 'PERBINCANGAN' whilst para 4.0 made mention of 'KEPUTUSAN MESYUARAT'. Hence we agreed with the learned judge that there was no dispute referred to the Energy Commission within the meaning of sub-s 30(1) and neither was there any order made by the Energy Commission under sub-s 30(2) of the Act. In our view, what transpired on 7 December 2012 and on previous occasions was that parties discussed and negotiated with the Energy Commission acting as the 'facilitator' or 'mediator' as requested by the appellant. As the words suggest, the function of the Energy Commission as the 'facilitator' or 'mediator' was not to make an order but to facilitate parties to reach an amicable settlement. C D

[31] On the other hand, a determination of a dispute as envisaged under s 30 of the Act entails the consideration of the dispute entirely by the Energy Commission without the element of 'negotiation' and 'discussion' or the involvement of a 'facilitator or a 'mediator'. E

Hence, it was our judgment that whatever decision reached on 7 December 2012 was not pursuant to the determination of the dispute by the Energy Commission under sub-s 30(2) but pursuant to several meetings held between the parties outside the ambit of the legislative scheme of s 30 of the Act. F

[32] As such, we found that the learned judge was correct in the following findings (record of appeal Part A: p 19): G

> I find that there is considerable merit in the submission of counsel for the defendant that the Energy Commission did not make a decision under section 30(2) of the Act on 7th December 2012. The Electricity Supply Act 1990 vests the power to make a decision in respect of the dispute between the parties with the Energy Commission. However, the meeting on 7th December 2012 was chaired by a Sabah Cabinet Minister, ie the Minister for Infrastructure and Development. The Minister announced that the purpose of the meeting was to table the settlement reached by the parties at the Energy Commission office. The minutes of the meeting (P4) do not mention section 30(2) of the Electricity Supply Act 1990 or that the Energy Commission was adjudicating a dispute and making a decision thereunder. In fact, the Minister said the parties had agreed to the 3 component system tariff after final negotiations. The Minister also proposed that the date of the enforcement of 3 component system tariff rates should be from 15th July 2011. The minutes then states that the 'meeting' agreed that the arrears should be paid with effect from 15th H I

July 2011. However, there is no record that the defendant had agreed to the proposal to pay arrears. It is axiomatic that an order or decision by an adjudicating body pursuant to jurisdiction conferred upon it by an Act of Parliament should be definite and unambiguous. In the instant case, the minutes taken on 7th December 2012 appears to record the terms of a settlement in a meeting chaired by a Minister of State and no more.

[33] There being no error on the part of the learned judge, we accordingly dismissed the appeal with costs.

Appeal dismissed with costs.

Reported by Dzulqarnain Ab Fatar